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No. 98-548

In The

Supreme Court of the United States

October Term, 1998

STEPHANIE PARKER-WEAVER, RIMS BARBER, ERIK FLEMING, DAVID INGEBRETSEN, AND ALI SHAMSID-DEEN,

Appellants,

v.

KIRK FORDICE, GOVERNOR OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI; CITY OF JACKSON, MISSISSIPPI; AND TERRY WALLACE, CITY ATTORNEY OF JACKSON, MISSISSIPPI,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OPPOSING MOTION TO AFFIRM

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In the page of their motion to affirm listing the questions presented, the appellees claim that appellants are seeking "some special, and lesser, test of standing" for cases brought under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. But that is not the case. As we point out in our jurisdictional statement, people such as appellants who are excluded from voting because of property requirements and a districting configuration clearly have standing to raise an equal protection claim. J.S. 10-11, *citing, Quinn v. Millsap,* 491 U.S. 95 (1989);

Turner v. Fouche, 396 U.S. 346 (1970); *Gomillion v. Lightfoot*, 364 U.S. 340 (1960); and *Kramer v. Union Free School District*, 395 U.S. 621 (1969). To contend, as we do, that they also have standing under Section 5 is not to invoke a "lesser" test of standing.

Of course, any standing question must be analyzed with reference to the particular statute or constitutional provision that underlies the substantive claim in the case. This does not imply a lesser test of standing, but simply an informed one. The problem in this case is that the District Court misunderstood Section 5, suggesting that standing cannot exist for those who are excluded from voting unless there is an allegation and proof of racial discrimination *before the local district court.* It is not enough, said the District Court, that the type of change *could* have a discriminatory purpose or effect, since such an injury is "conjectural and hypothetical," not "actual or imminent." J.S. App. 9a. As explained in the jurisdictional statement, however, the role of local Section 5 enforcement courts is to determine whether a particular type of change could affect voting, not whether the specific change has a discriminatory purpose or effect. J.S. 13-14, *citing, Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Perkins v. Matthews*, 400 U.S. 379 (1971). Also, the case law makes it clear that Section 5 enforcement courts should look to the *type* of change involved to determine if it is a voting change without requiring that plaintiffs prove a potential for discrimination in each individual case. *See, Allen*, 393 U.S. at 570; *Perkins*, 400 U.S. at 388-389; *Presley v. Etowah County*, 502 U.S. 491, 502 (1992) (discussing the "typologies" of changes that have been held to be covered by Section 5).

As the District Court noted, the appellants do not own property in the business improvement district at issue. J.S. App. 9a. As it further noted, their claim is that they are impacted by the challenged changes because they are thereby excluded from

voting on the establishment of this business improvement district, which will supplement or displace the city government of their city, the City of Jackson, with respect to various public municipal functions. J.S. App. 9a-10a. Certainly, there is no more concrete injury in a voting case than actually being *denied the opportunity to vote*. If the denial at issue in this case is going to be imbedded in Mississippi law and implemented in the City of Jackson in a way that prevents the appellants from voting, it first should be subjected to Section 5 scrutiny.

Yet the appellees assert that the changes "have no effect whatsoever on the composition of the city electorate, and no effect whatsoever on any other aspect of city elections or city services," Mot. to Aff. 6, and "do not effect any change in . . . any existing electorate." *Id.* 7. Therefore, they suggest, those excluded from voting on the business improvement district have no standing. But certainly, the unprecleared statute outlining the potential activities of business improvement districts makes it clear that these districts have the power to perform traditional city services -- such as fire prevention, assisting in law enforcement, and management of public facilities and parks. *See,* J.S. 4. And while the existing electorate of the City of Jackson has not been altered, these changes create a new and limited electorate, from which the appellants and most city voters are excluded, that will affect at least some of these public functions. Surely, those who are a part of the electorate for the city's government, which traditionally performs these functions, but who are excluded from voting on this new entity, have standing to challenge the failure to preclear these voting changes.[1]

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[1] By claiming that appellants do not have standing since they do not own property or reside within the business improvement district, both the appellees, Mot. to Aff. at 4, and the District Court, J.S. App. 9a, suggest that property owners within the district do have standing. But no one explains how those allowed to vote because of property ownership have standing, while those excluded do not. It is our position that all voters in the city have standing,

As pointed out in the jurisdictional statement, J.S. 7, this Court has not had occasion to address the issue of standing under Section 5 since the 1969 decision in *Allen v. State Board of Elections*, 393 U.S. at 557. It also has not addressed the issue of Section 5 coverage for voting changes involving special purpose districts. Yet the appellees argue that even if this Court

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both those allowed to vote for the business improvement district and those excluded. Individual property owners within the district certainly are affected by the change inasmuch as they are the people who are required to pay additional taxes -- so long as the district is established and approved by a 70% vote -- whether or not they cast their own ballot in favor of the business improvement district. If the change ultimately is submitted for preclearance, they could, for example, ask the Attorney General or the District Court for the District of Columbia to consider whether racial discrimination was involved in targeting certain people to pay these extra taxes. Those who are excluded from voting, such as the appellants, also are affected because the changes allow the establishment of a new public entity that will be performing various municipal public functions formerly performed by the city government of Jackson. Whether the business improvement district's efforts displace or simply supplement some of the functions of the city government, the appellants clearly have a voice in choosing the city government, but have none in the creation of the new district. If the change ultimately is submitted for preclearance, the appellants can and likely will ask the Attorney General or the District Court for the District of Columbia to consider the fact that with demographic changes, Jackson only recently has become a majority black city, only recently has elected a black mayor for the first time, and only recently elected a majority black city council. As these developments occurred, a new entity composed mostly of white property owners has been created over which the appellants and the majority black electorate have no voice, but which will displace or at least supplement certain important public functions. This is not, of course, the business of the local district court, but instead is the business of the Attorney General or the District Court for the District of Columbia. It is mentioned here simply to illustrate that, for this type of change, all municipal voters have standing under Section 5, and therefore plaintiffs in an enforcement case such as this need only allege that they are voters within the city. *See, NOW v. Scheidler*, 510 U.S. 249, 256 (1994) (motion to dismiss on grounds of standing should be denied "if relief could be granted 'under any set of facts that could be proved consistent with the allegations.'").

were to decide that the standing issue deserves review on the merits, probable jurisdiction should *not* be noted, and the District Court should summarily be affirmed, on the alternative ground that changes involving special purpose districts such as the ones at issue here are not voting changes covered by Section 5. Mot. to Aff. 7-11. In light of its ruling on standing, the District Court did not address the coverage question. J.S. App. 10a. As set out in the remainder of this brief, we believe these are voting changes covered by the statute. Assuming standing exists, the coverage question either should be remanded to the District Court or decided by this Court on the merits. But it is not and should not be an alternative basis for a summary affirmance.

Section 5 covers "voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s], or procedure[s] with respect to voting." By allowing for the creation of a public entity that can only be established through an election, by setting out the means of defining the election district, by setting out the qualifications of voters in the district, by setting out the method of alloting and counting the votes, and by establishing the date of the election from within a specified district, the state statute at issue and the related action of the City of Jackson encompass -- as a matter of language and common understanding -- "voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s], or procedure[s] with respect to voting."

Also, Section 14 of the Act, which defines the term "voting" as used in Section 5, refers not only to "votes cast with respect to candidates for public or party office," but also those with respect to "propositions for which votes are received in an election." 42 U.S.C § 1973*l*(c)(1). This definition covers the voting involved in the creation of the business improvement district. The efforts of the defendants to somehow distinguish the business improvement district and place it outside the context of a voting change are not supported by any of the

language in Section 5 or related provisions of the Voting Rights Act.

This Court consistently has stated "that § 5 is to be given a broad construction." *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). With Section 5, "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Board of Elections*, 393 U.S. at 566. "[T]he scope of § 5 is expansive within its sphere of operation. That sphere comprehends all changes to rules governing voting. . . ." *Presley v. Etowah County*, 502 U.S. at 501-502.

In addition, as noted in the Jurisdictional Statement, the United States Attorney General has concluded that Section 5 covers the state statute at issue here. J.S. 5; J.S. App. 4a, 16a. The Attorney General's interpretation in this regard is entitled to deference from the courts. *See, NAACP v. Hampton County*, 470 U.S. 166, 178-179 (1985).[2]

The appellees acknowledge the language of Section 14 of the Act which states that Section 5 encompasses "propositions for which votes are received in an election," but they contend that the word "propositions" is modified by the word "public"

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[2] The regulations of the Department of Justice contain a non-exclusive list of "examples of changes" covered by Section 5. That list includes "[a]ny change affecting the necessity of or methods for offering issues and propositions for approval by referendum." 28 C.F.R. § 51.13(j). This certainly could encompass the election to create the business improvement district here. In addition, the regulations cover "[a]ny change in the . . . boundaries of a voting unit." *Id.*, § 51.13(e). This also would appear to encompass the statute leading to the creation of the proposed business improvement district, which is a voting unit. At any rate, this list is non-exclusive, and even if these examples are not right on point, the Attorney General's statement that the challenged statute is a covered voting change is entitled to deference.

earlier in the sentence -- "with respect to candidates for *public* or party office and propositions for which votes are received in an election." From this they conclude that "[t]he voting which takes place in association with BIDS simply is not concerned with public office or public propositions, and is not, by definition, with the reach of the Act." Mot. to Aff. 8. Even accepting the questionable linguistic contention that "public" modifies "propositions" in Section 14, it is clear that the establishment of business improvement districts does affect public affairs such as fire prevention, assistance with law enforcement, and maintenance of public facilities and parks. *See*, J.S. 4.

Also, the appellees suggest that Section 5 governs voting changes relating only to entities that provide "*essential* services normally provided by government." Mot. to Aff. 11 (emphasis in original). Certainly, there is nothing in the language or structure of Section 5 that marks a statutory line between voting on "essential" services as opposed to those that are not "essential." But even if there were, there is no question that the legislation at issue gives business improvement districts the authority to become involved in the provision of "essential" services such as fire prevention.

In arguing that these voting changes fall outside Section 5's ambit, the appellees imply that business improvement districts are simply a collection of volunteers who band together to chip in money for common purposes, and that they do this entirely independent of the State and the City. Mot. to Aff. 1, 8. But that is totally wrong. The State, through the statute at issue here, not only accords business improvement districts the power to engage in various public municipal functions, but also specifies the means for establishing such a district, including the requirements for drawing the district, for who can vote and who cannot, for how the votes are to be counted, and for how many votes are needed to establish the district. Pursuant to the

statute, the City sets the date for an election from a specific district once it is drawn and then conducts the election. And the resulting tax payments are *not* voluntary. Even those property owners who vote against the district are levied additional taxes so long as there are enough votes to establish the district. It is the City which collects those taxes, no doubt against the will and preference of at least some of those who are taxed.

Thus, the State and the City are much more than the "honest broker" which the appellees portray as the limit of governmental involvement here. Mot. to Aff. 9. Indeed, the appellees' suggestion that the government is only an "honest broker" here is akin to suggesting that it is only an "honest broker" in political party primaries. But changes in the conduct of party primaries and certain party activies are voting changes encompassed by Section 5, *see, Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), and it is clear the changes here also are covered.

While the appellees contend that the business improvement district itself is "not a political subdivision of a covered jurisdiction," Mot. to Aff. 9, that is beside the point. *The State* clearly is a covered jurisdiction and *the City* is a political subdivision of it. When they make changes involving voting, as they have done here, they must submit them for preclearance.

The appellees cite decisions holding that some special purpose districts are not governed by the one-person, one-vote rule of the Fourteenth Amendment. Mot. to Aff. 10. However, those decisions make it plain that even though the particular strictures of the one-person, one-vote rule do not apply, the general provisions of the equal protection clause do. *See, e.g., Salyer v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 730 (1973). And this Court has made it clear that even though particular sorts of elections may fall outside the one-person, one-vote rule, changes involving those elections

nevertheless are covered by Section 5. *Compare, Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972) (three-judge court), *summarily aff'd*, 409 U.S. 1095 (1973) (one-person, one-vote rule does not apply to state court judicial elections), *with Clark v. Roemer*, 500 U.S. 646 (1991) (Section 5 covers state court judicial elections). *See also, Chisom v. Roemer*, 501 U.S. 380, 402-403 (1991).

In light of all of this, the changes at issue are voting changes covered by Section 5.

For all of these reasons, as well as those set out in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully Submitted,

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